Public Prosecutor v Zalili bt Mustapha

HIGH COURT (IPOH) — CRIMINAL APPEAL NO M6–41–38 OF 2009
TEO SAY ENG JC
29 OCTOBER 2009

Criminal Procedure — Acquittal or discharge — Discharge of accused not amounting to acquittal — Prosecution not ready to proceed with continued trial — Prosecution requested postponement to subpoena witnesses — Whether prosecution ready — Complainant no longer wished to pursue matter — Whether magistrate erred in granting accused discharge not amounting to acquittal — Circumstances when magistrate can order discharge not amounting to acquittal

The prosecution appealed against the order of discharge not amounting to an acquittal ('DNAA') made by the magistrate. The respondent was charged with theft under s 380 of the Penal Code. The case was first mentioned on 20 September 2006 and came up for hearing for the first time on 19 March 2007 and was postponed on numerous occasions. When the case came up for continued hearing on 24 April 2009, three prosecution witnesses had earlier given evidence. The prosecution asked for a final postponement as subpoenas for witnesses had not been applied for. The magistrate ordered a DNAA on the following grounds: firstly, it was an old case; secondly, the prosecution was not ready to proceed with the hearing; and thirdly, the complainant was no longer interested in pursuing the case. The issue arising was whether the reasons given by the magistrate when he ordered a DNAA were supportable in law?

Held, allowing the appeal:

(1) A magistrate may order a DNAA in the following circumstances under the Criminal Procedure Code ('CPC'): (i) when the prosecution declines to prosecute further at any stage before delivery of judgment under s 254 of the CPC; (ii) when the complainant is absent on the day fixed for hearing in a private prosecution initiated under s 133 of the CPC; and (iii) where the charge is groundless under s 173(g) of the CPC (see para 5(a), (b) & (c)).

(2) The first reason given by the magistrate was not supportable in law. The fact that a case being old, by itself cannot render a charge groundless. In determining whether to grant a postponement or a DNAA when the

police are not ready, the court has to find out if police investigations have been completed. If police investigations are completed, the magistrate should grant a postponement. If the police investigations are yet to be completed then the magistrate should grant the accused a DNAA (see para 7(a)).

(3) The second reason given by the magistrate was also not supportable in law. The magistrate should have granted a postponement and thereafter lodged a complaint against the prosecutor for his omission in applying for subpoenas for his witnesses (see para 7(b)).

(4) The third reason given by the magistrate was also wrong in law. Whenever a complainant indicates to the court that he or she has no longer wishes to pursue the matter, it is for the attorney general to decide whether or not to withdraw the charge against the accused. The court has no power to usurp the function of the attorney general as the public prosecutor by granting an order of DNAA (see paras 7(c) & 8).

[Bahasa Malaysia summary

Pihak pendakwaan merayu terhadap perintah dilepaskan tanpa dibebaskan ('DNAA') yang dibuat oleh majistret. Responden dituduh mencuri di bawah s 380 Kanun Keseksaan. Kes tersebut pertama kali disebut pada 20 September 2006 dan dipanggil untuk perbicaraan pertama kalinya pada 19 Mac 2007 dan telah ditangguh beberapa kali. Apabila kes ini disambung bicara pada 24 April 2009, tiga saksi pendakwaan telah memberi keterangan sebelum ini. Pihak pendakwaan memohon penangguhan yang terakhir kali disebabkan subpoena-subpoena bagi saksi-saksi belum dipohon. Majistret memerintahkan DNAA atas alasan-alasan berikut: pertama, bahawa kes ini merupakan kes lama, keduanya, pihak pendakwaan tidak bersedia untuk meneruskan perbicaraan tersebut, dan ketiga, pengadu tidak lagi berminat untuk meneruskan kes tersebut. Isu yang berbangkit ialah sama ada sebab-sebab yang diberikan oleh majistret apabila beliau memerintahkan DNAA disokong oleh undang-undang.

Diputuskan, membenarkan rayuan:

(1) Seseorang majistret boleh memerintahkan perintah DNAA pada keadaan-keadaan berikut di bawah Kanun Prosedur Jenayah ('KPJ'): (i) apabila pihak pendakwaan tidak lagi mahu meneruskan pendakwaan pada mana-mana peringkat sebelum penghakiman disampaikan di bawah s 254 KPJ; (ii) apabila pengadu tidak hadir pada hari yang telah ditetapkan untuk perbicaraan dalam prosiding yang dimulakan secara persendirian di bawah s 133 KPJ; dan (iii) apabila tuduhan tidak berasas di bawah s 173(g) KPJ (lihat perenggan 5(a), (b) & (c)).

(2) Alasan pertama yang diberikan oleh majistret tidak boleh disokong oleh undang-undang. Dalam menentukan sama ada untuk memberikan penangguhan atau DNAA apabila pihak polis tidak bersedia, mahkamah harus memastikan jika siasatan polis telah sempurna. Jika siasatan polis telah sempurna, majistret harus membenarkan penangguhan. Jika siasatan polis belum lagi sempurna, maka majistret harus memerintahkan tertuduh DNAA (lihat perenggan 7(a)).

(3) Alasan kedua yang diberi oleh majistret juga tidak boleh disokong oleh undang-undang. Majistret harus memberikan penangguhan dan kemudiannya membuat aduan terhadap pendakwaan atas peninggalannya memohon subpoena-subpoena untuk saksi-saksinya (lihat perenggan 7(b)).

(4) Alasan ketiga yang diberikan oleh majistret juga salah di sisi undang-undang. Apabila pengadu menyatakan kepada mahkamah bahawa dia tidak lagi mahu meneruskan perkara tersebut, peguam negara harus memutuskan sama ada untuk menarik balik tuduhan terhadap tertuduh. Mahkamah tiada kuasa untuk merampas fungsi peguam negara sebagai seorang pendakwa raya dengan memberikan perintah DNAA (lihat perenggan 7(c) & 8).]

Notes

For cases on discharge of accused not amounting to acquittal, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 104–111.

Cases referred to

Chu Chee Peng v PP (as we go to press we learn that an appeal against this decision has been lodged to the Privy Council ed MLJ) [1973] 2 MLJ 35, FC (refd)
Goh Cheng Chuan v PP [1990] 3 MLJ 401, HC (refd)
K Abdul Rasheed v PP; Ah Chak Arnold v PP [1985] 1 MLJ 193, HC (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166, HC (refd)
Pawanteh & Ors v PP [1961] MLJ 214, HC (refd)
PP v Au Seh Chun [1998] 6 MLJ 179, HC (refd)
PP v David Noordin [1980] 2 MLJ 146 (refd)
PP v Hettiarachigae LS Perera [1977] 1 MLJ 12 (refd)
PP v Karumah [1980] 2 MLJ 102 (refd)
PP v Leong Kow Chai [1968] 2 MLJ 29, HC (refd)
PP v Mat Radi [1982] 1 MLJ 221, HC (refd)
PP v Mohamed Said [1984] 1 MLJ 50, HC (refd)
PP v Semban [1976] 1 MLJ 91, HC (refd)
PP v Tan Kim San [1980] 2 MLJ 98 (refd)
Pendakwa Raya lwn Loo Tee Maw [1992] 2 MLJ 212, HC (refd)
Seet Ah Ann v PP [1950] MLJ 293, HC (refd)

Legislation referred to

Criminal Procedure Code ss 133, 173(g), (m), 254, 259, 376
Federal Constitution art 145(3)
Penal Code s 380

Zalina bt Awang (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Keshvinder Singh (Nazri, Saad & Associates) for the respondent.

Teo Say Eng JC:

[1] This is an appeal by the public prosecutor against the order of discharge not amounting to an acquittal made by the magistrate at Tapah on 24 April 2009.

[2] The respondent was charged with theft in a dwelling house under s 380 of the Penal Code. The case was first mentioned on 20 September 2006 and came up for hearing for the first time on 19 March 2007. The case had since been postponed on numerous occasions.

[3] When the case finally came up for continued hearing on 24 April 2009, three prosecution witnesses had earlier given evidence. The prosecution was not ready to proceed and asked for a final postponement as the subpoenas for witnesses had not been applied for. Learned defence counsel, Mr Keshvinder Singh urged the court for an order of discharge not amounting to an acquittal as this was an old case and it was traumatic for the accused if the court were to grant a further postponement. Learned defence counsel also informed the court that the complainant was no longer interested in pursuing the matter.

[4] The magistrate after hearing the submissions from both the parties, ordered the accused to be discharged not amounting to an acquittal. His reasons for granting such an order were as follows:

(a) this was an old case;

(b) the prosecution was not ready to proceed with the hearing; and

(c) the complainant was no longer interested in pursuing the case.

[5] The question before this court is whether the reasons given by the magistrate when he ordered a discharge not amounting to an acquittal are supportable in law?

[6] The court notes that magistrates, when deciding either to grant a postponement under s 259 of the Criminal Procedure Code (CPC) or a

discharge whenever the police are not ready, have constantly misdirected themselves or fallen into errors by adopting the practice of granting a discharge not amounting to an acquittal without ascertaining whether or not they have the powers to do so. It is appropriate for me to remind the magistrates whenever they give an order, there are two things which they must bear in mind. First, they must ensure that they have the power to make the order and secondly they must state clearly in their record the section of the Criminal Proceedure Code under which the order is made and the reasons for granting the order. In fact the law governing an order of discharge not amounting to an acquittal is clear. In a summary trial, a magistrate may order a discharge not amounting to an acquittal under three circumstances under the Criminal Procedure Code namely:

(a) *When the public prosecutor declines to prosecute further at any stage before delivery of judgment under s 254 of the CPC*

Section 254 of the CPC provides that where the public prosecutor declines to further prosecute an accused person upon the charge, all proceedings on such charge shall be stayed. The accused shall be discharged and such discharge shall not amount to an acquittal unless the court so directs.

In determining whether to grant an acquittal or discharge not amounting to an acquittal under s 254 of the CPC, the court must take into consideration all the relevant facts and factors placed before it including the intention of the public prosecutor as to the future prosecution of the accused on the charge (*Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401).

Thus, where the prosecuting officer informs the court that he does not propose further to prosecute the accused person on the charge and applies to the court to stay the proceedings under s 254 of the CPC on the ground that he cannot proceed with the case now as his witnesses are overseas and their dates of return unknown, the court would be justified in making an order of discharge not amounting to an acquittal *(Public Prosecutor v David Noordin* [1980] 2 MLJ 146).

But the court may acquit and discharge the accused where the public prosecutor informs the court that he will not ever prosecute the accused on the charge *(K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193; see also *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166; *Seet Ah Ann v Public Prosecutor* [1950] MLJ 293).

Whether or not a discharge shall amount to an acquittal depends on the circumstances of each case. The court in so deciding must bear in mind the public interest and right of the individual not to be saddled with a charge in which proceedings are stayed for an indeterminate period (see *K Abdul Rasheed*'s case).

A But the magistrates must take note that s 254 of the CPC will come into operation only if the prosecuting officer has made a decision not to prosecute the accused further.

(b) *When the complainant is absent on the day fixed for hearing in a private* B *prosecution initiated under s 133 of the CPC: s 173(m)*

This paragraph is applicable to a case upon complaint initiated under s 133 of the CPC. If a magistrate is satisfied that the complainant is absent with no sufficient reasons, he may discharge the accused provided that the offence is compoundable. The C discharge does not however amount to an acquittal.

(c) *Where the charge is groundless under s 173(g) of the CPC*

Section 173(g) empowers the court to discharge an accused person and not to acquit him (*Chu Chee Peng v Public Prosecutor (as we go to press we learn that an appeal against this decision has been lodged to* D *the Privy Council ed MLJ)* [1973] 2 MLJ 35 (FC)). In order to invoke s 173(g) of the CPC, a magistrate must be satisfied that the requirements laid down under para (g) have been complied with:

E (i) an order of discharge not amounting to an acquittal can only be made under this paragraph if the court considers the charge to be groundless.

[7] The court in *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50 at F p 52 did discuss the meaning of 'groundless' by referring to the *Short Oxford English Dictionary* to mean 'destitute of foundation, authority or support; having no real cause or reasons unfounded'. In determining whether or not a charge is groundless the magistrates should adhere as closely as possible to the guidelines laid down by case law namely:

G (a) Where investigations are completed by the police, the magistrate should postpone the case if the prosecution are not ready to proceed due to unavailability of witnesses (*Public Prosecutor v Semban* [1976] 1 MLJ 91; *Public Prosecutor v Hettiarachigae LS Perera* [1977] 1 MLJ 12; *Public* H *Prosecutor v Karumah* [1980] 2 MLJ 102).

(b) If the investigations are yet to be completed and the prosecution are still not ready with their case, it would be reasonable for the court to infer that the charge was groundless and grant a discharge not amounting to an acquittal (*Public Prosecutor v Tan Kim San* [1980] 2 MLJ 98).

I (c) Where a prosecution was conducted by a person who is not empowered to do so, it does not render the charge groundless (*Pendakwa Raya lwn Loo Tee Maw* [1992] 2 MLJ 212).

(d) Failure of the prosecution to supply to the defence certain requested

documents would not constitute a good ground entitling the magistrate to discharge the accused (*Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179).

(e) Non-appearance of a prosecuting officer or DPP would not constitute a sufficient ground to entitle the discharge of the accused (*Public Prosecutor v Mat Radi* [1982] 1 MLJ 221; *Pawanteh & Ors v Public Prosecutor* [1961] MLJ 214).

(ii) Having considered a charge groundless, a magistrate must state the reasons for doing so. This must be done at the stage when the magistrates decide to act under s 173(g) and not afterwards (*Public Prosecutor v Leong Kow Chai* [1968] 2 MLJ 29).

[8] From the record of this appeal, the prosecution had called three witnesses and intended to seek a final postponement as subpoenas had not been applied for. In this case the prosecution did not decline to prosecute, neither was it a private prosecution, the only power the magistrate had was to order a discharge under s 173(g) of the CPC if he considered the charge groundless. The magistrate had given three aforesaid reasons for granting an order of DNAA:

(a) *The first reason for granting a discharge not amounting to an acquittal was that the case in question was an old case*

The fact that a case being old by itself cannot render a charge groundless. Harun J (as he then was) in *Public Prosecutor v Hettiarachigae LS Perera* [1977] 1 MLJ 12 commented that 'even if it takes ten years to dispose a case that is better than pretending to dispose of it early by means not provided by the law'. The learned judge was of the view that the practice of the magistrates in granting DNAA when the police were not ready did not solve the problem as the police could always institute fresh proceedings against the accused. The same learned judge in his two subsequent cases namely *Karumah*'s case and *Tan Kim San*'s case (cited earlier in this judgment) has laid down the principles that in determining whether or not to grant a postponement or a discharge when the police are not ready, the court had to find out if the police investigations had been completed. If the police investigations are completed, the magistrate should grant a postponement. Whereas if the police investigations are yet to be completed then the magistrate should grant the accused a discharge not amounting to an acquittal.

I fully agree with the learned judge's views expressed in the above cases and should say that these are the correct principles of law governing the exercise of the magistrates' power under s 173(g) of the CPC. Based on the above principles, I therefore find that the first reason given by the magistrate is not supportable in law.

(b) *The second reason given by the magistrate was that the prosecution was not ready with the case*

This issue had in fact been settled where Harun J (as he then was) had laid down some guidelines as to the circumstances under which an order of DNAA should be granted by the magistrate which had been discussed earlier.

I, therefore strongly urge the magistrates to adhere to the guidelines laid down by the above case law in deciding whether or not to grant a postponement or an order of DNAA in cases where the prosecution are not ready with their case.

Since this is not a case where investigations by the police were not completed but a case where the court insisted that the prosecution to proceed to produce their evidence but the prosecution was not ready because subpoenas had not been applied for, the magistrate should not have acted hastily by granting a discharge not amounting to an acquittal but instead should have granted a postponement and thereafter lodged a complaint against the said police prosecutor for his omission in applying for subpoenas for his witnesses as has been rightly advised by Harun J (as he then was) in *Public Prosecutor v Hettiarachigae LS Perera* [1977] 1 MLJ 12 that 'one of the virtues of the judiciary is patience. If the waiting should become unbearable the remedy lies elsewhere'.

In the circumstances, I find that this reason is not supportable in law.

(c) *The third reason for granting a DNAA was that the complainant was no longer interested to pursue the matter*

It is not disputed that the power to institute, conduct or discontinue any proceedings for an offence is the sole prerogative of the attorney general as the public prosecutor (art 145(3) of the Federal Constitution). Section 376 of the CPC further declares that the attorney general as the public prosecutor shall have the control and direction of all criminal prosecutions and proceedings under the Code. Whenever a complainant indicates to the court that he or she has no longer wished to pursue the matter, it is for the attorney general to decide whether or not to withdraw the charge against the accused. The court has no power to usurp the function of the attorney general as the public prosecutor by granting an order of DNAA.

[9] I therefore find that the third reason given by the magistrate was again wrong in law.

[10] For the aforesaid reasons, I allowed the appeal and I set aside the order of DNAA granted by the learned magistrate and order the case to be sent back to the magistrates' court for mention on 28 October 2009.

Appeal allowed.

Reported by Kanesh Sundrum